

REPORT - PLANNING COMMISSION MEETING
September 25, 2003

Project Name and Number: **Big Box Retailers With Grocery (PLN2004-00060)**

Applicant: City of Fremont

Proposal: To consider a Zoning Text Amendment which would limit big box retailers with grocery sales.

Recommended Action: Recommend to City Council

Location: Citywide

Environmental Review: The proposed ordinance is exempt from review under the California Environmental Quality Act (CEQA) because this ordinance will not result in a direct or reasonably foreseeable indirect physical change in the environment. (See Title 14 California Code of Regulations section 15060(c)(2).)

Public Hearing Notice: Public hearing notification is applicable. A total of two notices were mailed to interested persons on September 15, 2003. A Public Hearing Notice was delivered to The Argus on September 10, 2003 to be published by September 15, 2003.

Executive Summary: Based on a Council referral, an ordinance (Zoning Text Amendment) is proposed to limit big box retailers with full-service grocery elements. The proposed ordinance would apply to: (i) stores of 150,000 gross square feet, or greater; (ii) stores open to the "general public" (e.g. not membership stores); (iii) limit such stores to the lesser of: (a) no more than 20,000 non-taxable stock keeping units (most grocery items are non-taxable), or (b) no more than 10% retail floor area for non-taxable grocery items; and (iv) provide no exemptions for existing stores.

Background: At the Council meeting of July 1, 2003, a majority of the Council supported a referral for information about what other cities are doing to regulate big box retail stores with full-service grocery elements, and directed staff to prepare an ordinance for Planning Commission review. (See Enclosure A.) On September 9, 2003, staff provided information to the Council summarizing the scope of such regulations by cities and counties in California, including the current status of such regulations. Staff also outlined a proposed ordinance which is being presented to the Planning Commission this evening.

Discussion: In the July 1, 2003 Council referral, concern was expressed regarding the economic and environmental impacts of certain types of big box retailers with full-service grocery elements. The policy concerns expressed included the preservation of existing neighborhood-serving commercial areas, as well as traffic and air quality impacts arising from such uses.

Staff contacted other California cities and counties to find out what was being done by other communities to mitigate these types of impacts. The results of that survey are as follows:

City / County	Big Box Size (in square feet)	Treatment of Membership Stores	Manner to limit non-taxable items	Exemption for Existing Stores
Contra Costa (subject to referendum)	90,000	Excludes membership stores / wholesale clubs	No more than 5% of sales floor area for non-taxable merchandise	No

Oakland (moratorium lapsed – no ordinance adopted) [Note: <i>Oakland may be reconsidering this matter in Fall 2003.</i>]	100,000	Excludes membership stores / wholesale clubs	No more than 10% of sales floor area for non-taxable merchandise	No
Martinez (valid ordinance)	90,000	No special treatment	No more than 5% of total sales floor area for non-taxable merchandise	Yes
Santa Maria (valid ordinance)	90,000	No special treatment	No more than 8% of gross floor area for non-taxable merchandise	No
Arroyo Grande (valid ordinance)	(a) 90,000 – 139,999 (b) 140,000 – 249,999 (c) 250,000 or more	No special treatment	(a) No more than 3% of square footage for non-taxable merchandise (b) No more than 2% of square footage for non-taxable merchandise (c) No more than 1% of square footage for non-taxable merchandise	No
Calexico (ordinance repealed by voters)	150,000	No special treatment	No more than 7.5% of total square footage for non-taxable merchandise	No
Inglewood (ordinance repealed by council)	155,000	No special treatment	<i>not available</i>	No
Los Angeles (under consideration)	155,000 in redevelopment enterprise and empowerment zones	No special treatment	No more than 20,000 non-taxable items unless 'living wage' agreement	No
Tracy (proposed by member of the public; staff analysis stated not applicable to Tracy)	130,000	No special treatment	No more than 10% of gross revenue from non-taxable items	No
Milpitas and Pinole (under consideration)	<i>(to be considered in fall 2003)</i>		<i>(no specific information available)</i>	

Proposed Ordinance (Zoning Text Amendment):

Any ordinance regulating big box retailers with grocery sales has the following key elements:

- A. Size of retailer / big box to be subject to regulation;
- B. Treatment of membership stores;
- C. Manner to limit non-taxable (e.g. grocery) items; and
- D. Treatment of existing stores.

Staff has recommended the following with regard to these elements:

A	Size of retailer	<i>135,000 s.f. or larger</i>
B	Treatment of Membership Stores	<i>Exempt</i>
C	Manner to Limit Grocery Items	<i>The lesser of: (a) 20,000 stock keeping units (SKU); or (b) 10% of gross floor area for non-taxable goods</i>
D	Treatment of Existing Stores	<i>No Exemption</i>

Staff's rationale regarding the proposal for each of these elements is as follows:

A. Size of Retailer / Big Box Subject to Regulation.

The survey indicated that some California cities and counties are regulating big box retailers beginning at 90,000 square feet. For comparison and informational purposes, the gross square footage of local retailers in Fremont is:

RETAILER	GROSS SQUARE FOOTAGE
Costco (on Albrae)	80,000
Home Depot (on Automall)	131,848
Target (at The Hub)	128,396
Safeway in Warm Springs (under construction)	53,912
WalMart (approved)	155,562

In addition, information from the Food Marketing Institute advises that the average size supermarket is 44,000 square feet.

Staff proposes a 135,000 square foot threshold to regulate large-scale big box retailers based on the size of stores existing in Fremont and staff understanding of market interests. Interested persons have suggested that the regulatory threshold be set at: (i) retailers of 100,000 gross square feet (comment from Mark Wolfe); or (ii) retailers of 150,000 net retail floor area (e.g. excluding from gross floor area the office, storage, and other non-public square footage) (comment from Judy Davidoff).

B. Treatment of Membership / Wholesale Stores.

Membership / wholesale stores (e.g. where a person must pay a membership fee to shop at the retailer) generate lower traffic volumes when compared to large discount retail stores.¹ This is based, in part, on the bulk manner in which items are sold at a membership store.

¹ The Institute of Traffic Engineers (ITE) sets traffic volumes for certain land use categories. Category 815 is "Free-Standing Discount Superstore", Category 861 is "Discount Club". The trip rates for Free-Standing Discount Superstore are higher than Discount Club by: (i) 12% for the daily trip end rate; (ii) 183% more AM Peak Hour rate; and (iii) 2% more PM Peak Hour rate. (Note: The City uses PM Peak Hour trip end rates for traffic analysis.)

Because of the concern expressed in the Council referral about traffic, staff proposes that the ordinance only apply to retail stores "open to the general public". Because membership stores charge a membership fee for customers, such stores would be exempt from the ordinance because the membership fee means that the store is not open to the general public – it is only open to members.

C. Manner to Limit Grocery Items.

The survey indicated that California cities and counties have considered a variety of approaches to regulate the grocery element of big box retailers. These approaches have included: (a) limiting the retail square footage of a store which may be used to sell non-taxable items; (b) setting a maximum number of stock keeping units (SKUs) for non-taxable items; or (c) setting a maximum percentage of a retailer's gross receipts which may be derived from non-taxable items.

As staff reviewed these different approaches, enforcement concerns were raised by staff and practical issues raised by interested parties. As a result of this review, staff proposes a two-pronged approach to limit non-taxable, grocery items: the *lesser of*: (a) 20,000 SKUs; or (b) 10% of gross floor area.

(a) Limit Retail Square Footage – Staff members have had difficult experiences trying to determine the "square footage" devoted to a particular use when a retailer has displays with multiple shelves, and the regulated items are interspersed with the non-regulated items.

One commenter has suggested that a limitation based on a percentage of retail square footage exclude pharmacy square footage (pharmacy items / prescription medication are non-taxable) because such shelf areas are not open to the public; and if the City pursues a regulation based on a percentage of retail square footage, that percentage be set at 15%. (Comment from Judy Davidoff.)

If the City pursues a regulation based on a percentage of retail square footage, another person has suggested that the percentage be set at 10%; and that retail floor area could be defined to exclude pharmacy area. (Comment from Mark Wolfe.)

(b) Limit Stock Keeping Units – The City of Los Angeles is considering a limitation based on the number of non-taxable stock keeping units (SKUs). Staff expects that auditing could be accomplished with cooperation from the retailer through a report about SKUs generated from the retailer's computer system which lists items in stock.

Information from the Food Marketing Institute advises that the average supermarket carries 35,000 SKUs.

Another commenter suggested that this SKU approach would be difficult for retailers to generate accurate reports, as most computer systems do not differentiate between items in stock (e.g. in the warehouse) versus items on retail display for sale; in addition, the same item being sold in different quantities would be reported as multiple SKUs; and pharmacy items only available by prescription would still be reported as a non-taxable SKU. (Comment from Judy Davidoff.)

Based on these experiences and comments, staff is proposing a two-pronged regulatory approach to best enforce the limitation on non-taxable grocery items based on the available audit / enforcement resources available.

(c) Maximum Percentage of Gross Sales – This approach was suggested by a member of the public to the City of Tracy (which has not adopted the proposal). Staff believes it would be difficult to determine an appropriate percentage for gross receipts from non-taxable items. The percentage may vary significantly seasonally, and pharmacy medical prescriptions may need to be excluded.

D. Treatment of Existing Stores.

Staff recommends that if the proposed ordinance is adopted, existing and approved stores would have to meet these restrictions.

Enclosure: City Council referral of July 1, 2003. (Informational)

Exhibits: Exhibit A – Proposed Ordinance

Recommended Actions:

1. Hold public hearing.
2. Recommend the City Council find the proposed ordinance is statutorily exempt under CEQA Guidelines, Section 15060(c)(2).
3. Recommend the City Council adopt the proposed ordinance (Zoning Text Amendment) to limit big box retailers with grocery, as set forth in Exhibit A.

{end}

lms
P:\sr03\PC - Big Box.doc

Exhibit "A"
Proposed Ordinance (Zoning Text Amendment) to
Regulate Big Box Retailers with Grocery Sales
Adding a New Section 8.22132.5 Big Box Retailers to
Article 21.3 Special Provisions Applying to Miscellaneous Uses,
Chapter 2 Zoning, of the Fremont Municipal Code.

Section 8.22132.5. Big Box Retailers.

(a) *Definitions.*

- (1) As used in this section, a "big box retailer" means a single business establishment or store which is open for retail sales to the general public and whose gross floor area is 135,000 square feet or larger. A "big box retailer" does not include stores which charge membership dues or periodic access fees, or wholesale clubs selling primarily bulk merchandise.
- (2) As used in this section, a "non-taxable item" means products, commodities, items or merchandise for sale to the public for which the State of California does not charge sales tax. For example, the following consumable and edible items: perishable food and food products, dairy and dairy products, meat and meat products, frozen food, and produce. Pharmacy medications requiring a doctor's prescription shall not be counted as a non-taxable item.

(b) *Non-taxable items limitation.* A big box retailer shall limit the sale of non-taxable items available for sale on the retail sales floor to the lesser of:

- (1) Not more than 20,000 stock keeping units (SKUs); or
 - (i) Non-taxable items sold in a pharmacy requiring a doctor's prescription shall not be counted towards the 20,000 SKU limit.
 - (ii) Non-taxable items in the storage or warehouse area of the business establishment or store, which are not available for selection by customers on the retail sales floor, shall not be counted towards the 20,000 SKU limit.
- (2) Not more than 10% of retail floor area.
 - (i) "Retail floor area" means interior building space devoted to the sale of merchandise, but excluding office space, pharmacy areas not open to the public, storage space, automobile service center, open-air garden center, and restrooms.

(c) *Enforcement.* The City of Fremont may audit a big box retailer to ensure compliance with the terms of this section. Upon reasonable notice, a big box retailer shall provide City staff access to the premises for inspection, as well as access to information about SKUs carried on the premises for retail sale.

{end}

P:\lord03\Big Box.doc